BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: COURT-APPOINTED INDEPENDENT COUNSEL ON BEHALF OF STUDENT, v. SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, SACRAMENTO COUNTY OFFICE OF EDUCATION AND CALIFORNIA DEPARTMENT OF EDUCATION.	OAH CASE NO. 2012120710 ORDER GRANTING MOTION TO DISMISS CALIFORNIA DEPARTMENT OF EDUCATION

On December 17, 2012, Student, a 16-year-old ward of the Sacramento County Juvenile Court who is currently placed in an out-of-state residential treatment facility, filed a Due Process Hearing Request (complaint) with the Office of Administrative Hearings (OAH) naming the Sacramento City Unified School District (SCUSD), the Sacramento County Office of Education (SCOE), and the California Department of Education (CDE), as respondents. The complaint seeks a declaration of which agency is responsible for providing special education to Student, and other relief, including an order directing CDE to: (i) immediately implement procedures under Government Code section 7585 to ensure that Student receives continued funding of Student's IEP placement and services; and (ii) develop one or more in-state residential treatment facilities that can met the needs of severely behaviorally-challenged students such as Student.

On December 21, 2012, CDE filed a Motion to Dismiss CDE from this matter on grounds that: (1) the complaint sets forth no facts under which CDE could be responsible for providing special education to Student; and (2) OAH lacks jurisdiction to order CDE to develop in-state residential treatment facilities. CDE did not address Student's claim that CDE is required to implement procedures under Government Code section 7585 to ensure continued funding of Student's placement. Student and SCOE opposed CDE's motion.

APPLICABLE LAW AND DISCUSSION

The Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et seq.) and its state law counterparts do not set forth a procedure for dismissing IDEA-related claims on the merits without first affording the petitioning party a chance to develop a record at hearing. The Administrative Procedures Act (Gov. Code, § 11340 et seq.) requires that parties appearing before the OAH receive notice and an opportunity to be heard, including the opportunity to present and rebut evidence. (Gov. Code, § 11425.10, subd. (a)(1).) However, at a prehearing conference, an administrative law judge (ALJ) may address such matters "as shall promote the orderly and prompt conduct of the hearing" (Gov. Code, § 11511.5, subd. (b)(12)), and at hearing, an ALJ may take action "to promote due process or the orderly conduct of the Hearing." (Cal. Code Regs., tit. 1, § 1030, subd. (e)(3).) Also, as an administrative tribunal, the OAH has jurisdiction to determine the extent of its own jurisdiction and power to act. (See *People v. Williams* (2005) 35 Cal. 4th 817, 824.)

Accordingly, OAH may dismiss a matter in its entirety, or one or more claims, where it is evident from the face of the complaint that the alleged issues fall outside of OAH jurisdiction or the pleaded facts cannot sustain a claim. Such circumstances may include, among other things, complaints that assert civil rights claims or claims seeking enforcement of a settlement agreement, or that assert claims against an entity that cannot be legally responsible for providing special education or related services under the facts alleged.

For reasons discussed below, CDE's motion to dismiss CDE from this matter is granted because: (i) it is evident from the face of the complaint that CDE cannot be legally responsible for providing special education or related services under the facts alleged; (ii) OAH lacks jurisdiction to adjudicate a claim that CDE is required to develop residential treatment facilities in California for severely behaviorally-challenged students; and (iii) OAH lacks jurisdiction to adjudicate a claim arising under Government Code section 7585, where the Superintendent of Public Instruction and the Secretary of Health and Human Services have not submitted the matter to OAH for review, and that section was modified to no longer apply to disputes about mental health services as of July 1, 2011.

Claim that CDE is Responsible for Providing Special Education Services to Student

To protect the rights of children and their parents and ensure that all children with disabilities have available to them a FAPE, the IDEA requires states to establish and maintain procedures that include the opportunity to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." (20 U.S.C. § 1415(b)(6) (A).) The Education Code grants parents, guardians and the public agency involved in the education of the child the right to present a due process complaint involving: a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child or the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial

responsibility. (Ed. Code, § 56501, subd. (a)(1)–(4).) The jurisdiction of OAH is limited to these enumerated circumstances. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Special education due process hearing procedures extend to a student's parent or guardian, to the student under certain conditions, and to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) The "public agency" may be "a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.) Similarly, the Code of Federal Regulations provides that the term "public agency" encompasses state educational agencies (SEAs) such as CDE, as well as local educational agencies (LEAs) such as SCOE and SCUSD, "and any other political subdivisions of the State that are responsible for providing education to children with disabilities." (34 C.F.R. § 300.33 (2012).)

The IDEA leaves it to each state to establish mechanisms for determining which of the state's public agencies is responsible for providing special education services to a particular student, and procedures for resolving interagency disputes concerning financial responsibility. (20 U.S.C. § 1400(d)(12)(A); *Manchester School District v. Crisman* (1st Cir. 2002) 306 F.3d 1, 10-11.) Under California law, the public agency responsible for providing education to a child between the ages of six and 18 generally is the school district in which the child's parent or legal guardian resides, (Ed. Code §48200), although certain responsibilities, such as the provision of special education services in juvenile court schools, may be regionalized by local plans and administered by county offices of education (Ed. Code, §§ 56140; 56195; 56195.5; 56205-56208; 46845 et seq.). For purposes of determining residency, the term "parent" includes a surrogate parent appointed by a LEA, or a responsible adult appointed by a juvenile court. (Ed. Code § 56028, subd. (a)(3), (5).) The OAH may determine the residency of a parent or guardian in a due process proceeding and thereby establish the public agency responsible for the student's special education. (See *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525; *J.S. v. Shoreline School Dist.* (W.D. Wash. 2002) 220 F.Supp.2d 1175, 1191.)

Under the IDEA, an SEA such as CDE is responsible for "general supervision" of state special education programs to ensure, among other things, that IDEA requirements are met. (20 U.S.C. § 1400(d)(11)(A).) However, CDE generally is not a party in a due process proceeding because a LEA – a school district or county office of education – not the CDE, is in most instances the public agency that is responsible for providing special education services, and "involved in any decisions regarding [the] pupil." (Ed. Code § 56501, subd. (a).) Three exceptions exist to this general rule:

First, CDE is the responsible public agency in due process hearings involving students attending the state schools for the deaf and for the blind that are operated by CDE (Ed. Code, §§ 59002; 59102). Second, CDE may be responsible for providing special education, by default, if conduct of the legislature or CDE has made it impossible to identify a responsible LEA. (See *Orange County Department of Education v. California Department*

of Education (9th Cir. 2011) 668 F.3d 1052, 1063, (holding CDE responsible for providing special education services to a parentless child where the Orange County Juvenile Court had not appointed a legal guardian or responsible adult, and then-existing California law under the facts presented did not allow identification of a "parent" for purposes of determining residency and a responsible LEA); *Los Angeles Unified School Dist. v. Garcia* (9th Cir. 2012) 669 F.3d 956, 960 (citing *Orange County*).) Third, CDE may be responsible for providing special education services where the relevant LEA is unable or unwilling to provide those services. (*Garcia*, at p. 960, citing 20 U.S.C. § 1413(g).)

None of the above special circumstances under which CDE may be responsible for providing special education services exists in this matter. The complaint alleges that:

(1) Student is 16 years old, a ward of the Sacramento County Juvenile Court, and eligible for special education services and related mental health services;

(2) the juvenile court in 2010 ordered SCOE to fund Student's individualized education program (IEP) placement in a residential treatment facility;

(3) in December 2011, SCOE appointed, for Student's educational purposes, a surrogate parent who resides in SCUSD, and in September 2012, the juvenile court appointed that same surrogate parent as the responsible adult authorized to make educational decisions on Student's behalf;

(4) pursuant to a December 2011 IEP meeting held by SCOE, Student's placement was moved to a residential treatment facility in Florida where Student is receiving mental health therapy to address assaultive behaviors;

(5) the Court of Appeal in November 2012 reversed the juvenile court's order that required SCOE to fund Student's placement, and SCOE has given notice that it will discontinue funding Student's placement and/or services effective January 1, 2013;

(6) SCUSD has given notice that it is not responsible for Student's IEP placement for the 2012-2013 school year and extended school year 2012 will not fund Student's placement and/or services;

(7) to avoid termination of Student's placement and services, Student submitted to the Superintendent of Public Instruction (CDE) written notice of SCOE's potential termination of funding of Student's special education placement and related mental health services (Gov. Code § 7585); and

(8) as permitted under Government Code section 7585, subdivision (g); Student also filed this request for a due process hearing with OAH, naming SCOE and SCUSD as respondents.

Thus, under the facts alleged: (1) Student is not attending one of the state schools for the deaf and for the blind that are operated by CDE; (2) Student does not contend that it is

impossible to identify a responsible LEA, and the complaint identifies the individual serving as Student's surrogate parent and responsible adult, who is Student's "parent" for educational purposes; and (3) although SCOE and SCUSD have each contended that it is not responsible for providing Student a special education, neither has indicated that it is "unwilling or unable" to provide Student a special education if, in this proceeding, it is found to be the responsible LEA and ordered to do so. Indeed, SCOE has previously provided Student a special education from 2010 to the present while pursuing its appeal of the juvenile court's order directing it to do so. Student's claim against CDE based on the possibility that the responsible LEA may be unwilling or unable to provide a special education therefore "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all'" (*Scott v. Pasadena Unified School Dist.* (9th Cir. 2002) 306 F.3d 646, 662 [citations omitted]), and is subject to dismissal under the ripeness doctrine, the purpose of which is "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." (*Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148 [87 S.Ct. 1507].)

CDE's motion to dismiss Student's claims that it is responsible for providing Student special education services is therefore granted.

Claim that CDE Must Develop In-State Residential Treatment Facilities

Student contends that, in order to receive a FAPE in the least restrictive environment (LRE) in accordance with the IDEA, Student must be placed in a residential treatment facility located in California that can meet the needs of severely behaviorally-challenged students such as Student. Student alleges that such a facility does not exist, and therefore seeks an order directing CDE to develop one or more of them.

As noted above, OAH's jurisdiction is limited to due process proceedings between a student, parent or guardian and the public agency involved in the education of the student, that seek to provide relief for the particular student with respect to the matters enumerated in Education Code section 56501, subdivision (a)(1)–(4). OAH's jurisdiction does not extend to claims that seek structural and systemic statewide relief such as the construction of new facilities sought by Student here.

CDE's motion to dismiss claims that it must develop in-state residential treatment facilities that can meet the needs of severely behaviorally-challenged students is therefore granted.

Claim that CDE Must Implement Procedures Under Government Code section 7585

Student seeks an order directing CDE to immediately implement procedures under Government Code section 7585 to ensure that Student receives continued funding of Student's IEP placement and services. CDE's motion did not address the issue of OAH jurisdiction over this claim. However, to promote the orderly and prompt conduct of the hearing, OAH will address this claim on its own motion.

Government Code section 7585 is included in Government Code Chapter 26.5, Division 7, Title 1, "Interagency Responsibilities for Providing Services to Children With Disabilities." (Gov. Code §§ 7570 – 7588.) As its name suggests, Chapter 26.5 concerns the responsibility, between public agencies, for the provision of certain related services to children with disabilities as defined under Title 20 United States Code section 1401(3). Prior to June 30, 2011, this chapter provided that the State Department of Health Care Services or a local agency designated by California Children's Services was responsible for providing medically necessary occupational therapy and physical therapy contained in a student's IEP (Gov. Code § 7575(a)(1)), and the State Department of Mental Health, or a community mental health service designated by it, was responsible for providing mental health services, such as residential treatment, that was required in a student's IEP. (Former Gov. Code § 7576 (a), repealed by Stats. 2011, ch. 43, §35.) In the event that occupational therapy, physical therapy, or mental health services were not provided as required under Government Code section 7575 and former section 7576, former Government Code section 7585 authorized the student, parent or the local educational agency responsible for the student's IEP to submit the matter for resolution by the Superintendent of Public Instruction and the Secretary of California Health and Human Services. (Former Gov. Code § 7585 (a), amended by Stats. 2011, ch. 43, §40.) However, effective June 30, 2011, Government Code section 7585 was amended to delete reference to repealed section 7576, and a failure to provide mental health services could no longer be submitted to the Superintendent of Public Instruction and the Secretary of California Health and Human Services for resolution.

OAH's jurisdiction with respect to Government Code section 7585 is limited to adjudicating the issue of an alleged failure to provide a related service or designated instruction and service required under Government Code section 7575, where the Superintendent and Secretary have submitted the matter to OAH for decision (Gov. Code § 7585, subd. (c)), or where a parent or LEA has appealed the resolution of such an issue arrived at in a meeting of the Superintendent and Secretary. (Gov. Code § 7585 subd. (e).) Here, Student does not allege that there has been any failure to provide medically necessary occupational therapy or physical therapy required under Government Code section 7575 and contained in Student's IEP, such as would bring Student's claims within the scope of the current version of Government Code section 7585. Further, even if such claims had been present, OAH does not have jurisdiction to compel the Superintendent or Secretary to conduct a resolution meeting or submit an issue to OAH for decision, or to otherwise implement section 7585. The remedy for an alleged failure to implement section 7585 is to pursue the matter before a court of competent jurisdiction, or, as Student has done, to file for a due process hearing regarding the substantive allegation, as specifically allowed under Government Code section 7585, subdivision (g) ("This section does not prevent a parent or adult pupil from filing for a due process hearing under [Gov. Code] Section 75865.")

Student's claim that CDE must implement Government Code section 7585 is therefore dismissed.

ORDER

1. Student's claims against CDE in this action are dismissed, and CDE is dismissed as a party in this action.

2. The matter will proceed as scheduled against the remaining parties.

Dated: January 23, 2013

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings